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BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. DOCKET FILE COPY ORIGINAL

In the Matter of)
)
1998 Biennial Regulatory Review)
-- Review of the Commission's Broadcast)
Ownership Rules and Other Rules Adopted)
Pursuant to Section 202 of the)
Telecommunications Act of 1996)

MM Docket No. 98-35

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To: The Commission

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS

Air Virginia, Inc., licensee of Station WUMX(FM), Charlottesville, Virginia, and Radio Palouse, Inc., licensee of Stations KQQQ(AM) and KHTR(FM), Pullman, Washington, by their undersigned attorney, hereby submit Comments in response to the following two questions raised in the *Notice of Inquiry* ("Notice") that the Commission released in the above-captioned proceeding on March 13, 1998.

1. Whether the current ownership limits set out in the Commission's rules are no longer necessary in the public interest?

2. Whether the way the Commission counts stations for the purpose of applying its local radio ownership rule should remain the same or be modified in order to more realistically account for the number of stations in a market.

I. The Current Ownership Limits Serve the Public Interest

As the Commission points out in the introduction to its Notice, for more than half a century the Commission has taken the position that the public interest is served through competition and diversity in the broadcast industry. Additionally, the Supreme Court has held that the Commission's use of its power to regulate broadcasting in the public interest to promote diversity furthers the purpose of the First Amendment which "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources."

Early in this decade, believing that increased consolidation in the

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radio broadcasting industry was necessary in order to put the industry back on a sound financial footing, the Commission revised its multiple ownership rules to permit the formation of multi-station combinations. However, in connection with the relaxation of its multiple ownership rules, the Commission attempted to preserve a respectable level of competition and diversity by imposing a limit on the size of the radio audience that any newly formed combination of stations could control.

In 1996, Congress passed legislation eliminating the audience share caps for new radio combinations and expanding the number of stations that could be commonly owned. The consequence of these actions has been a significant increase in the degree of ownership competition, and a significant loss of both competition and diversity in virtually all radio markets throughout the country.

Commentators believe that the Commission and the Supreme Court were correct in holding that competition and diversity in radio broadcasting serve the public interest. It is obvious that the greater the ownership concentration is in the radio industry, the less there will competition and diversity. Therefore, Commentators submit that the Commission's current ownership limits do continue to serve the public interest, albeit not as effectively as the more stringent limits that existed prior to 1992.

With regard the Commission's question as to whether "coverage of news and public affairs has been enhanced as a result" of the relaxation in the multiple ownership limits that have taken place since 1992, Commentators believe that coverage of news and public affairs has actually suffered as a consequence of the greater consolidation in the industry. With the exception of stations that specialize in news/talk programming, news and public affairs programming has never been a money

maker in radio. It is costly to produce, and it does not attract the large audiences that can be attracted by popular music formats. That this is so should come as no surprise to the Commission, as it is well aware that even when radio stations were required to devote specific minimum amounts of time to news and public affairs programming, most stations relegated such programming to early Sunday mornings and other time periods which were of marginal commercial value.

As radio station ownership has become more concentrated in large, publicly traded, companies that must generate every increasing cash flows to justify the high multiple prices that they have paid for their stations and to satisfy their shareholders, the trend has been for radio stations to present less news and public affairs programming and to devote more time to revenue generating entertainment programming. The tendency of group owners to eliminate news and public affairs programming and to replace it with entertainment programming has been evident in the local marketing agreements ("LMA's) which are frequently entered into in connection with station acquisitions. Commentators' undersigned counsel has negotiated many LMAs on behalf of parties selling to group owners. Almost invariably, regardless of the group owner involved, attempts by the selling licensee to reserve modest blocks of time for public affairs programming on Sunday morning have been vigorously resisted on the grounds that the reservation by the licensee of a couple hours on Sunday morning for the broadcast of programming to fulfill its public interest obligation is not compatible with the group owner's programming plans. Surely, if the group owners are unwilling to accede to a selling licensee's legitimate interest in reserving time to present public interest programming during the term of the pre-acquisition LMA, they are not going to present such programming themselves once they become the

licensees.

II. The Way the Commission Counts Stations For the Purpose of Applying Its Local Radio Ownership Rule Should Be Modified

The formula set out in Section 73.3555(a)(2)(ii) of the Commission's Rules for determining which stations are "in" a "radio market" for the purposes of applying the ownership limits of Section 73.3555(a) (the "Market Definition") is arbitrary and capricious. There is no logical reason for concluding, as the rule does, that a station whose principal city contour happens to overlap the principal city contour of one of several stations in a proposed multi-station combination competes, operates, or even provides a listenable signal within the radio market in which the stations in the proposed multi-station combination operate and compete. The arbitrariness and absurdity of the Market Definition is illustrated by the following examples:

Yucca Valley/Joshua Tree/Twenty-nine Palms, CA

The communities of Yucca Valley, Joshua Tree and Twenty-nine Palms, located in the Morongo Valley in Southern California receive primary service from the following five radio stations:

KQYN(AM), Twenty-nine Palms

KDHI(FM), Twenty-nine Palms

KCDZ(FM), Twenty-nine Palms

KYOR-FM, Yucca Valley

KKJT(FM), Joshua Tree

In 1997, the then licensee of Stations KQYN and KDHI, Three D Radio, Inc. ("3D") filed an application for consent to acquire KKJT (BALH-970320GF granted October 3, 1997). In order for the proposed acquisition to comply with the prohibition in Section 73.3335 against a single party owning more than 50% of the commercial radio stations in a radio market, 3D had to show that the principal city coverage contour of a sixth radio station in addition to the ones listed above overlapped some portion of

the principal city contours of KKJT, KQYN or KDHI. 3D made this showing based on the fact that the principal city coverage contour of Station KPLM, Palm Springs, California, overlapped that of Station KQYN to a barely perceptible degree in a remote mountainous area of the Joshua Tree National Monument. Notwithstanding the fact that Station KPLM not only did not provide primary service to any of the three communities comprising the Joshua Tree/Twenty-nine Palms/Yucca Valley Radio market, and did not even serve any people residing within the principal city contours of KKJT, KQYN or KDHI, the Commission counted Station KPLM as a station providing principal city coverage within the "relevant" market for determining whether 3D's application for consent to acquire KKJT was consistent with Section 73.3335(a) and granted the application.¹ The operation of Section 73.3335(a) in this case was patently absurd. Although the Rule purports to prohibit a single party from owning more than 50% of the stations in a market, in the KKJT case the Rule resulted in the Commission counting a station whose principal city contour was barely tangent to the principal city contour of the stations whose contours define the "relevant market" and which did not provide primary service to a single person within the relevant market as an "in market" station. As a consequence of this application of the Rule, 3D now owns three of the five stations (60%) that actually operate in and provide principal city coverage to the communities of Joshua Tree, Twenty-nine Palms and Yucca Valley and both competition and diversity have all but been eliminated from this market.

¹The licensee of one of the two stations in the Yucca Valley/Joshua Tree/Twenty-nine Palms market that would not be owned by 3D following its acquisition of KKJT had argued in a petition to deny the KKJT assignment application that it was absurd to count KPLM as an "in market" station in view of the *deminimus* overlap between KPLM and KQYN. In a letter ruling denying the petition to deny, the Chief, Audio Services Division, rejected this argument as being "contrary to Commissions practices and unsupported by rule or precedent (*Letter to David Tillotson* released October 6, 1997.)

Charlottesville, Virginia

In late 1997, Charlottesville Communications Corporation ("CCC") filed applications for consent to acquire five stations licensed to Charlottesville, Virginia (the "Charlottesville Applications"). Three of the Stations, WINA, WKAV and WQMZ were to be acquired from Charlottesville Broadcasting Corporation ("CBC") and two, WCHV(AM) and WWWV(FM) were to be acquired from Eure Communications, Inc. ("Eure").² At the time of the applications, CBC also programmed Station WUVA(FM) pursuant to a time brokerage agreement. Therefore, in order for the proposed acquisitions to be approved, CCC had to demonstrate that there were at least 12 commercial radio stations providing principal city service to the "relevant market" defined by the principal city contours of the five stations CCC was seeking to acquire.

In the multiple ownership showing submitted in the Charlottesville Applications, CCC was able to show that there were at least nineteen commercial radio stations, including the five that CCC sought consent to acquire and the sixth that it intended to program under a time brokerage agreement, that "produce predicted principal city contours which intersect the Radio Market" defined by the principal city contours of the stations proposed to be owned by CCC. However, the map depicting the actual principal city contours of the nineteen stations whose principal city contours "intersected" the principal city contours which defined the relevant Radio Market submitted as part of CCC's Section 73.3335(a) reflected that of the nineteen stations whose principal city contours

²BAL-971024H2; BAL-971024H3; BALH-971024H4; BAL-971024G9 and BALH-971024H1. These applications were withdrawn shortly after Air Virginia filed a petition to deny them. However, CBC and Eure recently filed new applications to consolidate the ownership of the three CBC and two Eure stations and control over WUVA in a single corporation, CCC. BAL-980625G; BAL-980625GF; BTC-980625GH; BALH-980625GG; BTCH-980625GI.

"intersected" those of the stations CCC was seeking to own, ten did not provide principal city service to the city of Charlottesville and the principal city contours of eight of the stations counted as "in market" fell short of the boundaries of Charlottesville by more than ten kilometers.

The *BIA Radio Yearbook*, 1997, listed only eleven stations as operating in the Charlottesville Radio Market. Significantly, these eleven stations included all those that provided principal city coverage to that city plus one whose principal city contour penetrated Charlottesville's boundaries and another whose principal city contour was tangent to the city's boundary. Taken together the Yearbook's listing of stations which compete in the Charlottesville market and the map depicting the contours of the nineteen stations that CCC counted as "in market" stations for purposes of its multiple ownership showing reflect that (i) stations which do not provide principal city coverage to the core of a radio market are not competitive factors in the market and (ii) the assumption underlying the Market Definition, to wit, that a station whose principal city contour happens to overlap however slightly with the principal city contour of one of several stations in a proposed multi-station effectively competes with those stations, is arbitrary and capricious.³

III. Proposals for Modifying the Definition of a Radio Market

The current Market Definition was adopted at a time when the test

³ The arbitrariness the Market Definition is further illustrated by the fact that if WWWV were removed from the group of stations that CCC had sought to acquire, the number of stations in the "relevant market" for determining whether CCC's proposed acquisition of the remaining four stations in the merger group complied with the multiple ownership rules would have shrunk from nineteen to twelve notwithstanding the fact that the radio market in which the stations in the merger group operate and compete for audience and revenue is the Charlottesville market whether or not WWWV is included in the merger group.

for determining how many stations a party could have an attributable interest in included a market share component. Consequently, at the time the Market Definition was adopted, the inherent irrationality of using overlapping principal city contours to determine the number of stations in a market was tempered by the fact that use of the Market Definition resulted in there being fifteen or more stations in all but the smallest or most remote radio markets and, thus, the undue market concentration that could have otherwise resulted from the Market Definition's over counting of stations in any given market was avoided by the application of the audience share restriction on new multi-station combinations.

The Telecommunications Act of 1996 which set new limits on the number of radio and television stations that could be owned in a given market and which eliminated the alternative audience share test for determining whether a new multiple ownership combination would be in the public interest did not provide a definition of "radio market" for the purposes of applying the new ownership limits, but rather left such details to the Commission. When the Commission acted, without notice and comment rulemaking, to implement the provisions of the Telecommunications Act of 1996 relating to multiple ownership limits, *Broadcast Radio Ownership*, 2 CR 376 (1996), the Commission revised its rules to reflect the new numerical limits specified in the Act without giving any consideration to whether the Market Definition should be revised in light of the fact that it tended to exaggerate the number of stations that actually compete in radio markets and the fact that the potential adverse impact on this exaggeration would not longer be tempered by an audience share restriction on the formation of new concentrations.

As the objective of the local ownership limits is to ensure that no single group owner so dominates a market as to stifle competition, the most logical way to determine the number of radio stations that "operate in" in a market that is surveyed by Arbitron or other rating services would be to count as "in market" stations only those stations that the rating services list as in market stations. An alternative method for determining how many stations operate in a given market would be to count all stations that provide principal city coverage within the community of license of at least one station in a proposed new multi-station combination as operating in the same market as the stations to be included in the combination.⁴ Such an approach would be consistent with the rationale underlying the principal city contour definition which is that this contour represents the minimum signal strength required in order for a station to provide reliable service within an urbanized area.

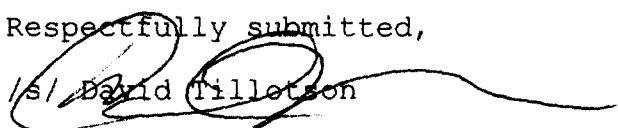
IV. Conclusion

The Commission's current ownership limits do continue to serve the public interest, albeit not as effectively as the more stringent limits that existed prior to 1992. However, the method that the Commission currently uses to determine how many stations compete in a radio market for the purpose of applying its local ownership is irrational, is over inclusive, and works to defeat the objective of the local ownership limit which is to preserve market competition. The alternative methods for counting the number of stations in a radio market proposed herein would more accurately and realistically reflect the number of stations that

⁴If the proposal to use ratings services to identify "in market" stations in rated markets is adopted, this alternative method could be employed for making such a determination in markets that are not rated

actually compete in a market than does the current Market Definition, and would preserve competition and diversity by ensuring that no single party could control more than 50% of the radio stations that are actually competing within any given radio market. Accordingly, Commentators submit that one of the two alternate formulas for determining the number of stations in a radio market proposed herein, or a combination of these formulas, should be substituted for the current Market Definition.

Respectfully submitted,


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